

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



75-2131

To Be Argued By  
BARBARA SHORE RESNICOFF

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.  
JAMES HAWKINS,

Petitioner-Appellant,

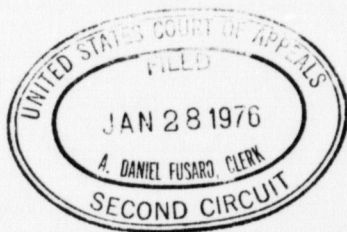
-against-

J. EDWIN LA VALLEE, Superintendent, Clinton  
Correctional Facility, Dannemora, New York,

Respondent-Appellee.

-----X

BRIEF FOR RESPONDENT-APPELLEE



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Respondent-Appellee	:

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant appeals from an order dated August 23, 1975 of the United States District Court for the Eastern District of New York (Weinstein, J.) denying petitioner-appellant's application for a writ of habeas corpus. On October 2, 1975 the District Court granted appellant's application for a certificate of probable cause.

By order dated October 28, 1975 this Court assigned the Legal Aid Society, Federal Defender Services Unit, as counsel for petitioner-appellant on appeal pursuant to the Criminal Justice Act.

#### Questions Presented

1. Whether appellant's rights were adequate during his trial?

2. Whether appellant's rights were adequately protected by a post-trial coram nobis proceeding?

#### Statement of Facts

Appellant was indicted under Kings County Indictment No. 3432/1966 for a 1964 robbery of the Bensonhurst Nursing Home, Brooklyn, New York.\* Appellant worked at the Home prior to the robbery and he was accused of planning the robbery that three others committed. The other three pleaded guilty to the robbery. Following his arrest,

\*Appellant was first arrested on October, 1964, but the charges were dismissed on February 1, 1965 for failure to prosecute.

petitioner had been admitted to Kings County Hospital by order of the criminal Court. At that point, he showed no significant pathology, discussed the charges, denied any seizures at the time of the robbery, and made no claims of amnesia or seizures\* at that time of life. Following the indictment in 1967, he was admitted to Kings County Hospital. He claimed at this point that he had seizures, and amnesia, but admitted to taking anti-convulsive drugs sporadically.

He was tried on the charges before Justice Ryan and a jury in Kings County Supreme Court on February, 1968. During that trial, according to Justice Ryan's letter dated February 14, 1968, "the defendant has what appears to be an epileptic seizure and has behaved strangely during the trial."

He again was sent to Kings County Hospital based on an abnormal EEG. At this point the examining physician concluded he was incompetent to stand trial. A mistrial was declared.

\*The Statement of petitioner's psychiatric history is based on the letter of Dr. Daniel Schwartz, admitted as evidence in the coram nobis hearing and found at Appendix E.

He was diagnosed as suffering from a chronic brain syndrome with convulsive disorder and was committed to Matteawan on March 4, 1968. In Matteawan he was initially mentally confused but soon began to improve. On June 14, 1968 he was examined by Doctors Tekben and Friedman, who found him fit to proceed." At that time, petitioner described the charges against him and said he could prove his innocence in court. He asked to be returned to Court. By letter dated June 25, 1968, the Superintendent certified to Justice Ryan that appellant was fit to proceed to trial.

Petitioner was treated with dilantin and phenobarbital until conviction. "There is no indication that he suffered any seizures in jail (nor did he in Matteawan) or that he showed any other psychiatric abnormalities during that period of time." (Appendix E, p. 3)

On June 28, 1968, an order was entered reinstating the proceedings and ordering his production in Supreme Court, Kings County. On July 11, 1968, appellant was again arraigned on the indictment, at this time represented by Joseph Slavin, who agreed to accept the Matteawan report.

Mr. Gartenhous, who represented petitioner at the first trial was reassigned to the case. On October 28, 1968, Mr. Gartenhous moved to be relieved as counsel. (Transcript of minutes hereinafter described as Exhibit "C" on record on appeal).

He stated that he would not have approved the psychiatric report (C-2). He felt that petitioner needed help and he could not represent him (C-5). It was disclosed that he had not visited the petitioner since sometime in September (C-8). Petitioner at this point coherently stated that he was ready for trial, that he had been trying to see his lawyer since September 30, and that he wanted a trial (C-8-12). Petitioner was assigned new counsel, Leo Nachbar, Jr. A jury trial was held December 3-5, 1968. During the trial, held before Judge Ryan who had ordered the first examination, the defendant behaved normally. There was no request for further mental examination for appellant, nor contentions that appellant was incompetent to stand trial. Appellant did not raise a defense of insanity. At the trial, there was

testimony that appellant had planned the robbery; gave firearms to the robbers, and pointed out the Nursing Home to the three men who robbed the Home. There was also testimony that appellant shared in the proceeds and sold a ring for one of the other men.

One of the convicted robbers was called as a defense witness. He testified that appellant had no part in the robbery, in contradiction to his previous statement to the police.

Appellant did not testify. He was convicted of robbery, larceny and assault. He was sentenced to a term of fifteen years to life imprisonment as a fourth felony offender.

Post Conviction State Proceeding

His conviction was affirmed without opinion by the New York Supreme Court, Appellate Division, Second Department on September 27, 1971 (37 A D 2d 801). While the

appeal was pending, a writ of error coram nobis was filed raising the issue of appellant's competency to stand trial, but it was denied without prejudice to renew after competition of the appeal. On November 29, 1971, appellant filed a motion to vacate judgment. The District Attorney consented to a hearing. On September 22, 1972, after a hearing on the motion, the Court ordered a hearing to determine appellant's competency at the time of trial and sentencing. A hearing was held on October 20, 1972 before Justice William T. Cowin.

Appellant testified that he was 57 years old. He stated that while he was incarcerated he had been receiving anti-convulsive drugs. He could not independently recollect his indictment, trial or sentence. He recollected epileptic seizures that he had. He also recollected conflicts with the law since the age of 13.

Upon cross examination, appellant testified that he requested medication while in Brooklyn House of Detention. Appellant stated he had no recollection of other events during the trial beyond requesting Mr. Gartenhous to have him examined as to his mental capacity to stand trial. He claimed he had no recollection of his attorney Mr. Nachbar.

Mr. Gartenhous was available to testify, but was not called as a witness. The letter of Daniel W. Schwartz, director of Forensic Psychiatry Service of Kings County Hospital Center and dated August 1, 1972 was stipulated into evidence. This letter was based on an examination of the appellant and a review of appellant's medical records.

The report reviewed appellant's medical history and his criminal history. In regard to the present crime, Dr. Schwartz reported that in 1965, when first admitted to Kings County Hospital the appellant coherently described the charges and how he had been incriminated. He denied any seizures in the recent past, nor did he claim seizures at the time of the robbery.

In 1967, following the indictment appellant had claimed seizures and amnesia. On February 15, 1968, after the mistrial he was described as having a chronic brain syndrome. After he was transferred to Matteawan he began to improve. He had no further seizures and was examined and found fit to proceed on June 14, 1968. After he was sent to Brooklyn House of Detention, appellant was treated

with delantin and phenobarbital. There is no evidence of any seizures or abnormalities at this time.

Dr. Schwartz concluded that the history of seizures was contradicted by other hospital records. Furthermore, his EEG on May 19, 1972 was normal. He noted that appellant's story changed during the time of the trial. Furthermore, he was examined and held to be fit to proceed in June 14, 1968 by Doctors Tekhen and Friedman. There was no evidence to the contrary to be found in the jail records or trial minutes to the contrary.

It was stipulated that if Justice Ryan were to testify, he would state: That he presided at both of appellant's trials; that at the first trial, he observed appellant suffer a seizure, ordered a mental examination and declared a mistrial on the basis of a report finding appellant incompetent. That at the second trial, no request was made by counsel for the defendant or by appellant for a mental examination nor was there any objection at the trial that appellant was unfit to proceed; nor was there any objection at the trial that appellant was

unfit to proceed; nor was there any conduct by appellant in the courtroom which would have caused Justice Ryan to question his sanity, or on his own motion, to order a mental examination for appellant. [Hearing-36, 42]

On January 10, 1973, the Court denied appellant's motion to vacate the judgment. The Court held that appellant had the burden of proving by a preponderance of the credible evidence that he was under such incapacity at the time of trial or sentence as would necessitate, vacating the judgment and that he failed to do so. The court held that petitioner's testimony was pure fabrication. The Appellate Division, Second Department affirmed on April 18, 1975 ( 47 A D 2d 1005). Permission to appeal to the Court of Appeals was denied on May 27, 1975.

#### Federal Court Proceedings

On June 26, 1975 appellant filed the instant pro se petition for a writ of habeas corpus on the grounds that the hearing court improperly passed the burden of proof on appellant to prove him incompetent; (2) the evidence was sufficient to find him incompetent at the

time of his second trial and sentence and (3) a retrospective determination of his competency was insufficient protection of his rights.

The District Court dismissed the petition on the basis of the record of the coram nobis hearing. The Court noted that appellant at an October 28, 1968 hearing was "articulate and effective" in pressing his desire for an early trial. The court also held, that assuming, that the State had the burden of proof, on the record the District Court found no reasonable doubt that petitioner was not competent to stand trial. "The record fully supports the conclusion that defendant's case at the pre-trial and post-trial levels was handled with fairness and with scrupulous attention to his constitutional rights."

However, because of the "novel circumstances described in the record and court's memorandum," the District Court granted appellant's application for a certificate of probable cause on October 2, 1975.

POINT I

THE APPELLANT'S DUE PROCESS RIGHTS  
WERE ADEQUATELY PROTECTED DURING  
THE PROCEEDINGS SURROUNDING HIS  
TRIAL.

Appellant claims that there was total disregard of his past mental history and present mental condition during his trial. However, this claim ignores the careful procedure that surrounded his trial.

Before the first abortive trial, appellant was examined at Kings County Hospital, before proceeding to trial. After his seizure, Judge Ryan, following the procedures of C.C.P. 658, sent him for a medical examination. After treatment, he was considered competent to stand trial, having an understanding of the charges and knowledge of his right to trial.

When he returned, that report was confirmed. When Mr. Gartenhous appeared before the Court, on October 28, 1958, he stated that he would not agree with the psychiatrist's report but he did not ask for a new hearing concerning competency. Instead he asked to be relieved, revealing he had not spoken to petitioner for 4 weeks. In contrast, the petitioner effectively and articulately asked for a trial.

Under these circumstances, it would seem that the Judge would properly follow § 662(c) and resume the trial, as if there had been no mental examination. Judge Ryan presided over the second trial, and having knowledge of the first trial, can be presumed to have watched for further signs of attacks. However, as stipulated later, there were no signs.\*

Mr. Nachbar, represented defendant during the several days of the trial, and claimed at sentencing that he had good knowledge of appellant. Certainly, he had a chance to observe appellant and yet he did not ask for a new examination. During that trial, there was no testimony by witnesses of appellant having seizures or psychotic moments.

Under these circumstances, it is clear that Judge Ryan was not derelict in his duties. He indeed followed New York Criminal Procedure Law, which does protect prisoner's rights. United States ex rel. Evans v. La Vallee, 446 F. 2d 482 (2d Cir. 1972).

\*Even if appellant suffered from epilepsy, he was receiving medication to control it. An epileptic suffers from epileptic disturbances only a fraction of 1% of the time of his life, and is otherwise competent. People v. Codarre, 245 N.Y.S. 2d 81, aff'd 200 N.E. 2d 570, cert. den. 379 U.S. 883. A psychiatric note dated June 11, 1969 at Sing Sing Prison noted that appellant was free of any overt psychosis, having received a neurological examination on June 2, 1969.

This case cannot be compared to either Pate v. Robinson, 383 U.S. 375 (1966) or Drope v. Missouri, 420 U.S. 162 (1975) where the trial courts ignored state procedure for determining competency in dealing with obviously bizarre defendants. In Pate v. Robinson, supra the court did not comply with the Illinois statute which required a trial court on its own motion to conduct sanity hearing where the evidence raised a bona fide doubt as to sanity. In that case the petitioner had a history of bizarre behavior and was in court for irrationally murdering his common law wife. He had been formerly imprisoned for the murder of his own son. At trial, four defense witnesses testified Robinson was insane. The Court refused the prosecutor's request to elicit testimony from the State's psychiatrist witness concerning sanity.

Similarly in Drope v. Missouri, the trial record itself raised doubt that the defendant was competent to stand trial. Drope was charged with raping his own wife. Drope's counsel requested a continuance for a psychiatric examination, which was unopposed by the Assistant District

Attorney. The Court refused to grant the motion on the grounds of improper motion papers. Counsel objected on the grounds that Drope was not a person of sound mind. At the trial, Drope's wife testified that on the Sunday before trial, Drope tried to choke her to death. Drope attempted suicide on the second day of trial and was not present at the trial. However, the court still did not order a psychiatric examination. In light of these facts, the court held that Drope was denied due process in not having a competency examination.

Appellant's mental history does not rise to the level of the defendant in Pate v. Robinson, especially since he was examined and held to be competent before trial; and there is no evidence of insanity or incompetency during the trial.

In a New York case, the New York Court ordered an examination of a defendant with a history of mental illness, under former New York Code of Criminal Procedure 258. The Court resumed trial when the defendant was held to be competent. During trial, the defendant requested new counsel, and his counsel was relieved. A mistrial was declared. A second trial began, but petitioner started to

act bizarrely toward the end of the hearing. A psychiatrist examined the defendant and found him to be competent and the trial resumed. No hearing was held, but there was an additional psychiatric examination before sentencing.

This Court held that the defendant's rights had been adequately protected although the court failed to order a hearing in regard to competency. As in this case, there had been no request for a hearing at this time.

"We do not understand Pate [Pate v. Robinson, 383 U.S. 375 (1966)] to mean that a trial court must always hold a sanity hearing on its own motion, no matter what the evidence is and regardless of whether or not a defendant requests one."  
United States ex rel. Evans v. LaVallee, 446 F. 2d 782, 786, cert. den. 404 U.S. 1020 (2d Cir. 1971).

See also United States ex rel. Suggs v. La Vallee, (390 F. Supp. 383, 390 (SDNY 1975) (sentencing court need not hold competency hearing sua sponte) (vacated and remanded on other grounds) United States ex rel. Suggs v. La Vallee, 523 F. 2d 539 (1975); United States ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir. 1972) at 1108, cert. den. sub. nom. Roth v. Zelker, 408 U.S. 927 (1972); United States ex rel.

Kay v. Zelker, 355 F. Supp. 1002, 1107-1008 (SDNY 1973) aff'd 474 F. 2d 1336 (2d Cir. 1973); Conner v. Wingo, 429 F. 2d 630, 639-640 (6th Cir. 1970) cert. den. 406 U.S. 921 (1972) (suicide notes by defendant, his unusual conduct at trial were offset by expert testimony at trial that man could talk easily and fluently and were insufficient to require trial judge sua sponte to hold competency hearing).

It can only be fair to conclude, as did the Court below, that appellant's case at the pre-trial, trial, and post-trial levels was handled with fairness and with scrupulous attention to his constitutional rights (Appendix B).

## POINT II

### APPELLANT'S DUE PROCESS RIGHTS WERE ADEQUATELY PROTECTED BY POST-CONVICTION PROCEEDINGS

- A. The coram nobis proceeding was sufficient to examine the competency of the petitioner.

Pate v. Robinson does not mandate instantaneous new hearings when competency is questioned. People v. Hudson, 19 N Y 2d 137, 278 N.Y.S. 2d 593 (1967) applied Pate v. Robinson, to New York Practice. In that case, it was held

that a post-conviction hearing could properly be held if the information could produce meaningful determination of competency at the time of trial. See also Conner v. Wingo, 429 F. 2d 630 (6th Cir. 1970); United States ex rel. Roth v. Zelker, 455 F. 2d 1105 (2d Cir. 1972). In the coram nobis hearing concerning appellant's competency, Judge Cowin had access to a medical statement by Dr. Daniel Schwartz who reviewed and reported the mental history of appellant, and summarized the psychiatric reports contemporaneous to the trial. The court also received the stipulation that Judge Ryan who presided at both trials would testify that there was no evidence of any incompetency at the time of the second trial.

Furthermore, there were contemporaneous records, notably on October 28, 1975 where defendant spoke coherently of his desire for an early trial and also an interview with Doctors Telben and Friedman on June, 1968 where appellant displayed his knowledge of the appellant's charges. Appellant spoke at sentencing to show his understanding of the sentencing. It is true that Mr. Nachbar was dead by the time of the coram

nobis hearing, but it is also true that Mr. Gartenhous, who was available for testimony, was not called as a witness. There is simply no evidence of incompetency at the time of the trial.

Judge Cowin instead found appellant's testimony of amnesia pure fabrication, and his finding of fact must be given great weight by this Court. La Vallee v. Delle Rose, 410 U.S. 690; United States ex rel. Phipps v. Follette, 428 F. 2d 912, 915-916 (2d Cir. 1970) cert. den. 400 U.S. 908 (1970).

On this basis, it must be held that the post-conviction coram nobis hearing adequately protected appellant's rights.

- B. The fact that appellant bore the burden of proof in his coram nobis hearing did not deprive him of due process.

\*Mr. Nachbar at sentencing, stated that he had occasion to confer with the defendant on many occasions and got to know him better than normal. He was also aware of the previous mistrial, but did not ask for a new examination or hearing on competency.

New York State Law is clear in requiring that "the defendant has the burden of proving by a preponderance of the evidence, every fact essential to support the motion" to vacate judgment in post-conviction proceedings. Criminal Procedure Law § 440.30(6).

Appellant concedes the requirement, but contends that he met his burden at the earlier coram nobis hearing on August 4, 1972, and therefore the burden passed to the State. However, this contention is belied by the facts of the hearing and by the requirements of CPL § 440.30. The minutes of August 4, 1972 reveal that Judge Cowin was attempting to ascertain the issues to be covered in a coram nobis hearing at that time. There was no evaluation or conclusion made at this time (See Memorandum dated September 22, 1972 - Appendix D). Instead, the court merely determined there were issues to be reviewed. The appellant still had the burden of proof at the hearing on October 20, 1972, in the determination of competency.

According to N.Y. Courts petitioner could justifiably bear the burden of proof in post-conviction proceedings concerning competency. "After a defendant has been convicted on plea of guilty or after trial, the People are not required to assume the burden again of

establishing that what was done was regular in the absence of evidence to the contrary." People v. Smyth, 3 N Y 2d 184, 187 (1957); People v. Gonzalez, 43 A D 2d 914 (1st Dept. 1974); People v. Erazo, 34 A D 2d 623 (1st Dept. 1970 aff'd 28 N Y 2d 617 (1971)).

In Drope v. Missouri, supra, the Supreme Court specifically held in regard to review of incompetency claims that "we do not question the State's power, in post-conviction proceedings to reallocate the respective burdens of the individual and the State and to delimit the scope of State appellate review. Cf. Hawk v. Olson, 326 U.S. 271 279 (1945); Conner v. Wingo, 429 F. 2d 630, 637-639 (A D 1970).

The cases which appellant cites do not form justification for a contrary holding. People v. Santos, 43 A D 2d 73 (2d Dept. 1973) deals with a pre-trial hearing pursuant to New York CPL 730.30 rather than a post-conviction hearing. Jackson v. Denno, 378 U.S. 368 (1964) should be read as dealing with the admissibility of confessions, and indeed was limited in New York State to the burden of proof in admission of confessions. People v. Huntley, 15 N Y 2d 72 (1965). See also Lego v. Twomey, 404 U.S. 477 (1972).

Assuming arguendo that the burden of proof should have been placed on the state, nonetheless there is no evidence to present the slightest doubt of petitioner's competency. The Court below, contrary to appellant's claim in Point II of his brief did not conclude that the State had the burden of proof but stated that arguably the State should have borne the burden of showing competency at the coram nobis hearing. However, it was not necessary to resolve the issue. It was clear to the court below, as it was clear to the coram nobis judge, there was no reasonable doubt in the record concerning petitioner's competency to stand trial.

CONCLUSION

FOR THE FOREGOING REASONS, THE  
ORDER OF THE DISTRICT COURT  
SHOULD BE AFFIRMED.

Dated: New York, New York  
January 28, 1976

Respectfully submitted,

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Of Counsel

STATE OF NEW YORK )  
: SS.:  
COUNTY OF NEW YORK )

SUSAN D. CHIECO , being duly sworn, deposes and  
says that she is employed in the office of the Attorney  
General of the State of New York, attorney for Respondent  
herein. On the 28th day of January , 1976 , she served  
the annexed upon the following named person :

RICHARD GREENBERG, ESQ.  
Legal Aid Society  
Federal Defender Services Unit  
509 United States Courthouse  
Foley Square  
New York, New York 10007

Attorney in the within entitled proceeding by depositing  
a true and correct copy thereof, properly enclosed in a post-  
paid wrapper, in a post-office box regularly maintained by the  
Government of the United States at Two World Trade Center,  
New York, New York 10047, directed to said Attorney at the  
address within the State designated by him for that  
purpose.

Susan D. Chieco

Sworn to before me this  
28th day of January , 1976

Barbara Hor. Kenicoff  
Assistant Attorney General  
of the State of New York

